PUBLIC EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF DELAWARE

ARMOND WALDEN,	:	
	:	
Charging Party,	:	
	:	**ULP No. 10-05-743**
v.	:	
	:	**Probable Cause Determination**
STATE OF DELAWARE, DELAWARE TRANSIT CORPORATION,	:	**and Order of Deferral**
	:	
	:	
Respondent.	:	

Appearances

Armond Walden, Charging Party, Pro Se

Thomas J. Smith, SLREP, for DTC

BACKGROUND

The State of Delaware ("State") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA" or "Act"), 19 Del.C. Chapter 13 (1994). The Delaware Transit Corporation ("DTC") is an agency of the State.

Charging Party, Armond Walden ("Charging Party"), is a former employee of DTC who, during the period of his employment, was a public employee within the meaning of 19 Del.C. §1302(o). During the period of his employment Charging Party was a member of the bargaining unit represented by the Amalgamated Transit Union, Local 842, ("ATU") which represents a bargaining unit of DTC employees for purposes of collective bargaining and is certified as the exclusive bargaining representative of that

unit pursuant to 19 Del.C. §1302(j).

ATU and DTC are parties to a collective bargaining agreement which has an expiration date of November 30, 2008, but which remained in full force and effect at all times relevant to this Charge.

On or about May 21, 2010, Charging Party filed an unfair labor practice charge alleging that DTC violated 19 Del.C. §1301; 1303(1) and (3); and 1307(a)(1), (a)(2), (a)(3), (a)(4), and/or (6), which provide:

§1301 It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

(1) Granting to public employees the right of organization and representation;

(2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations; and

(3) Empowering the Public Employment Relations Board to assist in resolving disputes between public employees and public employers and to administer this chapter.

§1303 Public employees shall have the right to:

(1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.

(3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this

§1307(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

(2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.

(3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.

(4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter.

(6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

Charging Party was terminated on or about January, 2010, as set forth in the termination letter sent by the Secretary of Transportation, dated January 11, 2010:

> As you know, on Monday, January 11, 2010, a pre-termination hearing was held for you at Delaware Transit Corporation's (DTC) Monroe Street facility. Present at the hearing were: Paul J. Kulesza, Chief Transportation Supervisor, Mid-County; Larry D. Vaughan, Chief Transportation Supervisor, North; Wali Rushdan, President Local 842, ATU; Joseph Megginson, Vice President, Local 842, ATU; Lillian Shavers, Shop Steward, Local 842, ATU; Richard Seibel, Labor Relations Specialist; and Charles D. Moulds, Fixed Route Transportation Manager, serving as the Hearing Officer. The hearing was convened as a result of your failure to follow the directive of a supervisor (insubordination); unauthorized interruption of service; and unauthorized use of a company revenue vehicle.
>
> As you are aware, Fixed Route Operators perform a vital and essential function, and your misconduct directly impacts our ability to serve the public, but DelDOT must review each case on its own merits. After reviewing your case, it is Mr. Moulds' recommendation that, due to your actions, your employment be terminated.
>
> Accordingly, this letter is DelDOT's official notification that your employment with DTC will be terminated, effective January 15, 2010.
>
> Executive Director Stephen B. Kingsberry has been advised of this decision. If you have any questions, please contact Mr. Kingsberry at (302) 760-2833.
>
> You have the right to appeal this decision through the grievance procedure as outlined in the collective bargaining agreement between

Local 842 Amalgamated Transit Union (AFL-CIO) and the Delaware Administration for Regional Transit, Delaware Transit Corporation (December 1, 2002 – November 30. 2007).

Charging Party asserts he was terminated for violating a written DTC policy regarding cell phone use, and because he is a former acting Union President and a current Union activist who testified at PERB hearings on behalf of other DTC employees over the objection of DTC to PERB subpoenas.

Charging Party asserts that the DTC Cell Phone policy is invalid because it constitutes a term and condition of employment which was not negotiated. He alleges that Operators are required to use personal cell phones to contact dispatch and emergency services because the radios on the buses are unreliable. He further alleges that he has been singled out for termination in order to discourage active participation in the union.

On or about June 25, 2010, DTC filed its Answer to the Charge. It denies its Cell Phone Usage policy is "new" policy as alleged as the policy was enacted in August 2000. Because the statutory filing period for the filing of an unfair labor practice charge is 180 days, the Charge as it relates to the cell phone policy is untimely.

DTC further denies Charging Party's allegations concerning what constitutes permissible and impermissible cell phone use. DTC also denies that Charging Party was terminated for violating the cell phone policy or for any legitimate protected activity. Rather, his dismissal resulted from what DTC characterizes as "egregious misconduct."

Under New Matter, DTC maintains that the current dispute is a proper subject for deferral to contractual arbitration under the PERB's discretionary deferral policy. Charging Party's termination was grieved and scheduled for arbitration on August 2, 2010.

DTC alleges that even with all reasonable inferences drawn in Charging Party's favor, nothing in Charge could reasonably be construed or inferred to constitute the statutory violations enumerated therein.

On or about July 21, 2010, Charging Party filed his Response essentially denying the New Matter. Specifically, with regard to the statutory filing period, Charging Party acknowledges that while the filing period may have expired with regard to the initial policy, that does not apply to the revised policy dated December, 2009.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

> (a) Upon review of the Complaint, the Answer and the Response the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board shall decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
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> (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers*

v. DART/DTC, Del. PERB Probable Cause Determination, ULP 04-10-453, v. PERB 3179, 3182 (2004).

PERB has previously addressed the question of the sufficiency of an unfair labor practice charge for the purpose of the probable cause determination. In *American Federation of State, County, and Municipal Employees, Council 81, Local 3911. v. New Castle County, Delaware* (Del. PERB, ULP No. 09-07-695, VI PERB (2009) 4445) the full PERB held:

> PERB Rule 5.2 (c)(3), requires "a clear and detailed statement of the facts constituting the alleged unfair labor practice..." Sufficient information must be included in pleadings to allow a preliminary assessment of the procedural and substantive viability of the charge, i.e., the probability that there is a sufficient cause to continue to process the charge.

On its face, this Charge fails to allege any facts which would establish that DTC has engaged in conduct which tended to interfere with, restrain or coerce the Charging Party in the exercise of any rights guaranteed by the statute, in violation of 19 Del.C. §1307(a)(1), §1301, and/or §1303.

The statutory unfair labor practices defined in §1307(a)(2), and (a)(3) relate to prohibitions on the public employer in terms of its relationship with and conduct toward the exclusive bargaining representative of a bargaining unit of employees. These provisions do not relate rights of individual employees. The Charge does not allege any facts which relate to interference with organizational rights.

19 Del.C. §1307(a)(6) is a derivative charge that an employer has failed or refused to comply with "any provision of this chapter or with rules and regulations established by the Board..." Again, the pleadings fail to establish a basis for this charge.

The only remaining allegation is that DTC, in terminating the Charging Party,

discharged him " ... because the employee has signed or filed an affidavit, petition or complaint, or has given information or testimony under this chapter," in violation of §1307(a)(4). Charging Party asserts his termination was not for just cause and that his prior status as "acting President" during a period of trusteeship for the local union and his testimony given in PERB hearings concerning other unfair labor practice proceedings against DTC, has resulted in discriminatory treatment.

Charging Party's right to just cause for termination arises exclusively from the collective bargaining agreement and must be enforced through the negotiated grievance procedure. Whether his termination was improperly based on protected activity requires the interpretation of and application of the collective bargaining agreement which is a proper subject for the contractual grievance and arbitration procedure. "According to established Delaware case law, the PERB's jurisdiction is limited to resolving statutory issues which do not include issues involving the interpretation and application of contract language." *Caesar Rodney Education Assn., DSEA/NEA v. Board of Ed.,* (Del. PERB, ULP No. 96-01-165 (9/9/98).

Where the resolution of an alleged statutory violation is directly related to the resolution of a contractual issue, the PERB has adopted a discretionary and limited deferral policy: "When the parties have contractually committed themselves to mutually agreeable procedures for resolving contractual disputes, it is prudent and reasonable for this Board to afford those procedures the full opportunity to function." *Fraternal Order of Police Lodge No. 1 v. City of Wilmington,* ULP 89-08-040, (Del.PERB), I PERB 44912/18/89), citing *Collyer Insulated Wire,* NLRB, 129 NLRB837 (1971).

DTC and ATU Local 842 have negotiated a grievance procedure which

culminates in the submission of unresolved issues to final and binding arbitration before an impartial arbitrator. Accordingly this unfair labor practice charge is stayed pending the exhaustion of that contractual grievance and arbitration procedure.

The Board's deferral policy is not, however, unconditional, in that it does not constitute a final resolution of the pending unfair labor practice charge. Where deferral is authorized, the PERB will retain jurisdiction over the initial unfair labor practice charge for the express purpose of reconsidering the matter, on application of either party, for any of the following reasons:

> 1) that the arbitration award failed to resolve the statutory claim;
>
> 2) the arbitration has resulted in an award which is repugnant to the applicable statute;
>
> 3) that the arbitral process has been unfair;
>
> 4) that the dispute is not being resolved by arbitration with reasonable promptness.

DECISION

Considered in a light most favorable to Charging Party, the pleadings fail to establish probable cause to believe that unfair labor practices, as alleged, in violation of 19 Del.C. §1301; 1303(1) and (3); and 1307(a)(1), (a)(2), (a)(3), and/or (6), may have occurred. Accordingly, those portions of the Charge are hereby dismissed, with prejudice.

Whether Charging Party's termination was improperly based on protected activity in violation of 19 Del.C. §1307(a)(4) requires a determination as to whether he was discharged for just cause. Just cause for termination arises exclusively from the negotiated collective bargaining agreement.

WHEREFORE, this unfair labor practice charge is deferred to the parties' contractual grievance and arbitration procedure. The parties are to notify the Pubic Employment Relations Board within sixty (60) days from the date of this decision of the status of this matter.

The Public Employment Relations Board retains jurisdiction over the charge that DTC has acted in violation of 19 Del.C. §1307(a)(4) for the express purpose of reconsidering the matter, on application of either party, for any of the following reasons:

1) that the arbitration award failed to resolve the statutory claim;
2) the arbitration has resulted in an award which is repugnant to the applicable statute;
3) that the arbitral process has been unfair; and/or
4) that the dispute is not being resolved by arbitration with reasonable promptness.

IT IS SO ORDERED.

Date: September 3, 2010

CHARLES D. LONG, JR.,
Hearing Officer
Del. Public Employment Relations Bd.